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10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF LOS ANGELES

12 **PLASTIC PIPE AND FITTINGS ASSOCIATION, a**
13 **National Trade Association and an Illinois Not-for-**
14 **Profit Corporation,**

Petitioner,

15 v.

16 **CALIFORNIA BUILDING STANDARDS**
COMMISSION, a commission of the State of
17 **California within the State and Consumer Services**
Agency; and the CALIFORNIA DEPARTMENT OF
18 **HOUSING AND COMMUNITY DEVELOPMENT,**
an agency of the State of California; the
19 **CALIFORNIA DIVISION OF THE STATE**
ARCHITECT-STRUCTURAL SAFETY, an agency of
20 **the State of California; the CALIFORNIA OFFICE**
OF STATEWIDE HEALTH PLANNING AND
21 **DEVELOPMENT, an agency of the State of**
California; the CALIFORNIA DEPARTMENT OF
22 **HEALTH SERVICES, an agency of the State of**
California; and the CALIFORNIA DEPARTMENT
23 **OF FOOD AND AGRICULTURE, an agency of the**
State of California; and DOES 1 through 50, inclusive,

24 Respondents.

Case No. BS 076413

**OBJECTIONS TO TERMS
AND LANGUAGE OF
PROPOSED JUDGEMENT
AND PROPOSED WRIT OF
MANDATE**

Dept.: 85

Judge: Hon. Dzintra Janavs

25
26 **INTRODUCTION**

27 On December 19, 2002, the Court granted the petition for writ of mandate in this matter
28 and directed the Petitioner to prepare a proposed judgment and writ for the review of Respondents

1 and the Court. Essentially, the Court determined that the Respondent agencies had acted in an
2 arbitrary and capricious manner in excluding cross-linked Polyethylene (“PEX”) from the 2001
3 California Plumbing Code and that they erred in requiring a CEQA study of PEX on the basis of an
4 expert report that lacked the proper evidentiary foundation.

5 Petitioner Plastic Pipe and Fittings Associations (“PPFA”) has proposed a judgment and
6 writ that do not comply with the law and that exceed the scope of the issues in this case.

7 Respondents object both to the terms of the proposed judgment and writ and to specific
8 language in these documents. Respondents are submitting counter proposals that are consistent with
9 these written objections.

10 Instead of setting aside the decisions of the Commission and the Department Agencies
11 (“Agencies”), and remanding the matter to them for action consistent with the Court’s decision, the
12 Petitioner’s proposed judgment would approve PEX, for all building types without regard to
13 individual agency considerations or conditions based on facts available to respondents at the time
14 they revisit the PEX issue on remand. As proposed, the PPFA orders put the Court in the untenable
15 position of violating the doctrine of separation of powers by substituting its judgment for that of the
16 administrative agencies, and compelling the agencies to take specified quasi-legislative action.

17 To compel a particular decision is to intrude on the legislative process. “The propriety
18 or impropriety of a particular legislative decision is a matter for the Legislature and the
19 administrative agencies to which it has lawfully delegated quasi-legislative authority; such matters
20 are not appropriate for the judiciary.” (*Western States Petroleum Association v. Superior Court*
21 (1995) 9 Cal.4th 559, 572.)

22 Respondents also object to the proposed language which would vacate all administrative
23 determinations regarding the 2001 California Plumbing Code. This is an overbroad request that is
24 unnecessary to resolve the PEX question. The 2001 California Plumbing Code was published on
25 May 2, 2002 and subsequently filed with the Secretary of State and, as a matter of law, became
26 effective within 180 days of publication. (See Health & Saf. Code § 18938 (a) and (c)).

27 Finally, Respondents object to the amount of time the proposed documents allow for
28 further proceedings.

I.

**THE COURT CANNOT DIRECT RESPONDENTS TO EXERCISE
THEIR DISCRETION IN A PARTICULAR MANNER AND SHOULD
REMAND THE MATTER FOR FURTHER PROCEEDINGS.**

In its proposed judgment and writ of mandate, Petitioner would have the Court order all respondents to adopt PEX in the California Plumbing Code using findings “consistent” with those of the March 12, 2002 Department of Housing and Community Development findings. This proposal is inconsistent with the Court’s finding that PEX was not approved for use in California as a matter of law and with the separation of powers doctrine. It is also inconsistent with the fundamental rule that mandate does not lie to compel an administrative agency to exercise its discretion in a particular manner. (*Western States Petroleum Association v. Superior Court*, *supra*, 9 Cal.4th at 572.)

The adoption of regulations is a discretionary act and the Court cannot mandate the content of regulations to be adopted by a statewide agency. (*Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616.) Nor can the Court issue a writ dictating the content of regulations, even after the Court has found that the agency has not proceeded in the manner required by law. (*City and County of San Francisco v. Superior Court* (1976) 57 Cal.App.3d 44 [county failed to adopt standards for welfare payments; superior court issued a writ saying that it would adopt standards; reversed on appeal because the superior court encroached on legislative territory; court of appeal ordered remand to county to adopt standards, which could then be reviewed again by the court].)

The Court cannot limit agency discretion on remand. (*McBail v. Solano County Local Area Formation Commission* (1998) 62 Cal.App.4th 1223.)

Indeed, as a matter of law, Respondents have not exhausted their discretion with regard to including PEX in the California Plumbing Code. (See *English v. City of Long Beach* (1950) 35 Cal.2d 155, 160 [Quasi-judicial mandate case holding that on remand for failure to provide fair hearing, agency may free to reconsider issues because it has not exhausted its discretion until it provides fair hearing].) In the instant case, Respondents have not exhausted their discretion with regard to the inclusion of PEX in the 2001 California Plumbing Code and, on remand, they retain

1 the discretion to consider new evidence and to determine whether the public interest requires the
2 imposition of conditions or restrictions on the use of PEX.

3 The governing statutes confer Respondents with discretion to make changes and deletions
4 when adopting model codes. (Health & Saf. Code § 18930^{1/}) Additionally, on remand, Respondent
5 agencies have the discretion to review the PEX issue, in light of all the available information.
6 (Health & Saf. Code § 18930; *California Association of Nursing Homes v. Williams* (1970) 4
7 Cal.App.3d 800; see also *California Cas. Indemn. Exch. v. Industrial Accident Commission* (1923)
8 190 Cal. 433, 438, where the Commission petitioned for rehearing or modification of the Supreme
9 Court's judgment in order to admit additional evidence. The Court stated, "It is unnecessary to
10 modify the judgment for this purpose. The effect of our decision is to vacate the judgment
11 heretofore rendered by the Industrial Accident Commission and to set the matter at large, for
12 proceedings not inconsistent herewith.")

14
15 1. Health and Safety Code section 18930 provides in part:

16 (a) Any building standard adopted or proposed by state agencies shall be submitted
17 to, and approved or adopted by, the California Building Standards Commission prior to codification.
18 Prior to submission to the commission, building standards shall be adopted in compliance with the
19 [Administrative Procedure Act] Building standards adopted by state agencies and submitted to the
20 commission for approval shall be accompanied by an analysis written by the adopting agency or
21 state agency that proposes the building standards which shall, to the satisfaction of the commission,
22 justify the approval thereof in terms of the following criteria:

23 (1) The proposed building standards do not conflict with, overlap, or duplicate other
24 building standards.

25 (2) The proposed building standard is within the parameters established by enabling
26 legislation and is not expressly within the exclusive jurisdiction of another agency.

27 (3) The public interest requires the adoption of the building standards.

28 (4) The proposed building standard is not unreasonable, arbitrary, unfair, or
capricious, in whole or in part.

(5) The cost to the public is reasonable, based on the overall benefit to be derived
from the building standards.

(6) The proposed building standard is not unnecessarily ambiguous or vague, in
whole or in part.

(7) The applicable national specifications, published standards, and model codes have
been incorporated therein as provided in this part, where appropriate. . .

(b) In reviewing building standards submitted for its approval, the commission shall
consider only the record of the proceedings of the adopting agency, except as provided in
subdivision (b) of Section 11359 of the Government Code.

1 **A. Further Evidence May Be Considered On Remand**

2 The Agencies and the Commission acted on the understanding that the burden is on the
3 proponents to demonstrate that PEX should be included in the California Building Standards Code.
4 The court’s decision puts the burden on the Agencies and the Commission to show whether PEX
5 should or should not be included in the California Building Standards Code.

6 The Agencies and the Commission therefore need the opportunity on remand to act in
7 accordance with the decision of the court and to obtain information regarding the suitability of PEX
8 for use in California prior to making a new decision.

9 Further, the Agencies and the Commission, if they decide to approve PEX, must determine
10 whether such approval should be for restricted uses. For example, they may decide impose
11 conditions that PEX not be buried in contaminated soil, and that it not be used for high water
12 temperatures, that it not be used with chlorinated water, that it not be used for exterior applications,
13 that it not be used where sterile piping is required, or any other condition they deem warranted after
14 further investigation of the properties of PEX. These are matters for legislative decision, not judicial
15 decision, under the constitutional requirements of separation of powers.

16 PPFA has published an installation handbook for PEX showing that PEX is subject to
17 permeation by petroleum products and subject to degradation by sunlight. That handbook, portions
18 of which are attached to the Declaration of Don Harris (Exhibit 1), and available from the PPFA
19 web site (www.ppfahome.org), states:

20 “LIMITATIONS ON PEX USE ...

21 “Do not use in any application where tubing will be exposed to direct sunlight.

22 “Do not allow tubing to come in extended contact with any of at least the commonly
23 encountered construction materials listed below: (This list is not all-inclusive.) Pipe thread
24 sealing compounds; Fire wall penetration sealing compounds. *Exception: water soluble,*
25 *gypsum-based caulking*; Petroleum-based materials such as: Kerosene Benzene Gasoline,
26 Solvents, Fuel Oils Cutting Oils Asphaltic Paint, and Asphaltic Road Materials. Consult
27 your tubing manufacturer if you have questions about these or any other materials not listed.

28 “Do not place PEX tubing in heavily contaminated soils or other heavily contaminated
environments.

 “Do not use in swimming pool piping systems.” (Exhibit 1, attachment; italics in original.)

1 This Handbook shows that PEX may create public health and environmental problems, if petroleum
2 products and other harmful materials from contaminated soils penetrate the piping and leach into
3 drinking water. The Commission certainly is entitled, and may even have the obligation, to
4 determine if PEX should be approved with certain conditions.

5 Further, Wirsbo is a member of Petitioner PPFA.^{2/} Wirsbo manufactures a form of PEX
6 called Aquapex, which was installed in a home in Scottsdale, Arizona. During the homeowner's
7 litigation against the builder and manufacturer, laboratory tests were conducted on the water inside
8 the Aquapex piping, and it was determined that MTBE, benzene-4 and a termiticides were leaching
9 through the pipe into the drinking water inside the pipe. (Exhibit 2.) This information suggests that
10 there is a real danger from the use of PEX. Under these circumstances, the Respondents have
11 discretion to determine the circumstances and conditions for the use of PEX in California.

12 Additionally, IPEX is a member of PPFA.^{3/} IPEX has published a "Chemical Resistance
13 Guide" which rates the resistance of various types of plastic to various chemicals.^{4/} The Guide states
14 that PEX has "no resistance" to benzene.^{5/} Benzene is a known humane carcinogen. (See excerpt
15 in Exhibit 3.) The Respondents should have an opportunity to consider this information.

16 It is especially important that the Commission and the Agencies have the opportunity to
17 consider this and other evidence, because the court has put the burden on them to show whether PEX
18 should or should not be included in the California Building Standards Code. The Agencies and the
19 Commission must now have the opportunity to take action consistent with that ruling. (See
20 *California Association of Nursing Homes v. Williams* (1970) 4 Cal.App.3d 800 and *California Cas.*
21 *Indemn Exch. v. Industrial Accident Commission* (1923) 190 Cal. 433, 438.)

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26 2. See list of PPFA members at www.ppfahome.org, "site map" and "member links."

27 3. See list of PPFA members at www.ppfahome.org "site map" and "member links."

28 4. The Guide is available at www.ipexinc.com, "download brochures," "international information," "Chemical Resistance Guide."

5. Guide, page 11.

1 II.

2 **THERE IS NEITHER A LEGAL NOR A FACTUAL BASIS FOR**
3 **REQUIRING THE REMAINING RESPONDENTS TO ADOPT THE**
4 **HCD FINDINGS AND STATEMENTS OF REASONS.**

5 In paragraph 1 of the Proposed Writ and in paragraph 2(a) of the Proposed Judgment, the
6 Court would direct all respondents to issue final express terms, final statements of reasons and final
7 nine point criteria “consistent with respect to cross-linked polyethylene (“PEX”) with the initial
8 statement of reasons proposed by Respondent Department of Housing and Community Development
9 on March 12, 2001.”

10 The agencies involved in the adoption of building standards have jurisdiction over specific
11 types of structures: the Office of Statewide Planning and Development(OSHPD) is responsible for
12 hospitals, clinics, health facilities and correctional health facilities; the Office of the State Architect
13 is responsible for school standards. the Building Standards Commission sets standards for state
14 buildings; the Department of Food and Agriculture sets standards for dairies and State Fairs and the
15 Department of Health Services establishes standards for swimming pools and the Department of
16 Housing and Community Development sets standards for housing construction.

17 As a matter of law, the Legislature has determined that each of these agencies has
18 expertise in specific types of construction and that oversight responsibility should be distributed
19 accordingly among these agencies. There is neither a legal nor factual basis for requiring OSHPD,
20 for example, to adopt the March 12, 2002 HCD findings regarding PEX. OSHPD had never
21 approved PEX for health facilities construction in California and local building officials have no
22 jurisdiction over health. OSHPD did not approve PEX because it needed time to study whether it
23 was appropriate for health facilities. The PEX installation restrictions, OSHPD confirms
24 reservations regarding the use of PEX in health facilities including that:

- 25 1. The use of PEX piping would be problematic in hospital buildings, in my opinion, because
26 many of the limitations of the material provided in the manufacturer’s literature.
 - 27 · Water for laundry and dish washing use in hospitals must be provided at high
28 temperature.
 - Many common construction materials used in hospital construction, including pipe
thread compounds, fire wall penetration sealing compounds and petroleum-based
materials, are not appropriate for use with PEX piping.
 - Contaminants contained in the soil or the environment may leach into the water
supply. If PEX piping were used in hospitals, this could place patients and essential

- 1 hospital services in jeopardy.
- 2 · Remodel work in hospitals is often ongoing, so the chance of damaging existing
3 piping is higher than in other building types. PEX piping is more susceptible to
4 mechanical damage than metallic pipe.
 - 5 · PEX piping is not recommended for use in swimming pool systems. Many hospitals
6 have therapy pools as part of their service.

7 (See Decl. of Donald Harris (Exh. 1))

8 **III.**

9 **THE TERMS OF THE PROPOSED JUDGMENT AND WRIT ARE 10 OVERBROAD AND WOULD REPEAL PORTIONS OF THE 2000 11 PLUMBING CODE THAT WERE NEVER AT ISSUE.**

12 Paragraph 2 (a) of the proposed judgment and paragraph 1 of the proposed writ direct
13 respondents to vacate final express terms, final statements of reasons, and final nine point criteria
14 adopted and approved for the 2001 California Plumbing Code. Taken literally, this is overbroad and
15 would result in the repeal of the entire 2001 California Plumbing Code. This may be a mere drafting
16 error but the paragraphs, as presently drafted, are overbroad and contrary to law.

17 The validity of the entire 2001 California Plumbing Code is not at issue in this proceeding
18 and, as a matter of law, the adopted code was effective on November 2, 2002, 180 days after the
19 action of the Building Standards Commission. (Health & Saf. Code. § 18938 (a) and (c)^{6/}.)

20 **IV.**

21 **THE TIME TO REPORT ON COMPLIANCE SHOULD BE MODIFIED.**

22 The judgment and the writ direct the respondents to report back to the Court within 30 days
23 of the issuance of the writ on what they had done to comply with the Court's order. Respondents
24 submit that a key date is the finality of the judgment rather than the issuance of the writ. While this
25 will be more than 30 calendar days it will allow for a more meaningful response to the court because
26 the Commission generally meets at 60 day intervals. The Commission members live throughout the
27 state and have other employment it is difficult to schedule even regular meetings let alone a quorum

28 6. Health and Safety Code section 18938 provides in part: "(a) Building standards shall be
filed with the Secretary of State and codified only after they have been approved by the commission
... (c) Except as otherwise provided in this subdivision, an adoption, amendment, or repeal of a
building standard shall become effective 180 days after its publication in the triennial edition of the
California Building Standards Code or one of its supplements . . ."

1 on short notice. Furthermore, because the judgement is not final for sixty days after entry, it is more
2 appropriate to require a report after the finality of judgement rather than the issuance of writ.
3 Furthermore Health and Safety Code section 18935 requires State agencies and the Commission to
4 provide notice of proposed building standards.

5 DATED: January __, 2003

6 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Plastic Pipe and Fittings Association v. Building Standards Commission, et al.**
Case No.: **BS 076413**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

On January, 2003, I served the attached **OBJECTIONS TO TERMS AND LANGUAGE OF PROPOSED JUDGEMENT AND PROPOSED WRIT OF MANDATE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January ___, 2003, at Sacramento, California.

Declarant

Signature